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Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief *Amici Curiae* of the Hon. Patricia Schroeder, Member of Congress, and The ACLU Women's Rights Project, Chicana Service Action Center, Creative Employment Project, Equal Rights Advocates, Inc., Federally Employed Women, Federally Employed Women's Legal and Education Fund, League of Women Voters of the United States, National Association of Black Women Attorneys, Inc., National Conference of Puerto Rican Women, Inc., National Federation of Business and Professional Women's Clubs, Inc., National Women's Employment Project, National Women's Political Caucus, National Organization for Women, NOW Legal Defense and Education Fund, Organization of Chinese American Women, 60 Words Per Minute, Skilled Jobs for Women, Inc., Wider Opportunities for Women, Inc., Women Employed, Women in Apprenticeship Program, Inc., Women in Construction Project, Women Working in Construction, Women's Division of R.T.P., Inc., Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, Women's International League for Peace and Freedom, and YWCA Women's Trade Center

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[Counsel listed inside front cover]

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of the Honorable Patricia Schroeder, Member of Congress, and the ACLU Women's Rights Project, the Chicana Service Action Center, the Creative Employment Project, Equal Rights Advocates, Inc., Federally Employed Women, the Federally Employed Women's Legal and Education Fund, the League of Women Voters of the United States, the National Association of Black Women Attorneys, Inc., the National Conference of Puerto Rican Women, Inc., the National Federation of Business and Professional Women's Clubs, Inc., the National Organization for Women, the NOW Legal Defense and Education Fund, National Women's Employment Project, National Women's Political Caucus, the Organization of Chinese American Women, 60 Words Per Minute, Skilled Jobs for Women, Inc., Wider Opportunities for Women, Inc., Women Employed, Women in Apprenticeship Program, Inc., the Women

in Construction Project, Women Working in Construction, Women's Division of R.T.P. [Recruitment and Training Program], Inc., the Women's Equity Action League, the Women's Equity Action League Educational and Legal Defense Fund, the Women's International League for Peace and Freedom, and the YWCA Women's Trade Center with the written consent of the parties as provided in Rule 42 of the Rules of this Court.

Representative Schroeder and each of these groups are committed to the elimination of discrimination in employment on the basis of sex, race, and national origin; to the achievement of meaningful occupational choice for women and minorities; and to effective enforcement of the laws and regulations guaranteeing equal employment opportunity. The groups include both national and local membership organizations,

as well as public interest projects whose particular concern is equal employment opportunity. They represent thousands of working women -- construction workers, government workers, lawyers, secretaries, bookkeepers, business owners, laundry workers, insurance and bank administrators. They include white women, black women, Puerto Rican women, Chicana women, and Asian American women; women who are represented by unions and those who are not. Amici share a deep conviction that, if reasonable, voluntarily-adopted, race- or sex-conscious affirmative action programs such as that at issue in this case are invalidated, the national policy mandating equal employment opportunity for women and minorities will become an empty promise, virtually unattainable for generations to come.

A full description and statement of interest of each of the organizations is set forth in Appendix A, infra.

SUMMARY OF ARGUMENT

I.

No case could be more appropriate for upholding the adoption of affirmative action than the case at bar. Here, a union and an employer voluntarily created, in the collective bargaining process, a program to train unskilled workers in the skilled crafts. Moreover, to ameliorate the vast under-representation of blacks in the skilled trades, they agreed that one-half the trainees in the program would be black. While no specific finding that either the employer or union had itself discriminated against blacks was made below, well-recognized exclusionary practices of training programs in other fields contributed to the near-total absence of qualified blacks in the pool of skilled crafts workers. In these

circumstances, no other remedy could effectively or reasonably be utilized to achieve the goal of equal employment opportunity for blacks.

Women, too, bear the burden of a history of exclusionary employment practices that bar them from the higher-paying skilled trades (as well as from other higher-paying occupations). The same remedies -- including the voluntary adoption of specific numerical goals for training programs -- are required to make equal employment opportunity more than a meaningless phrase for women.

II

The inferior position of women in the present-day labor force can only be described as a serious national problem. Women are the majority of the nation's poor. They earn, on the average, under 60% of

what men earn. Segregated into low-paying, low-status "women's jobs," they are vastly under-represented in the skilled trades and in executive and professional positions.

This unfortunate situation is the result of a historical record of legal and customary exclusionary practices, traceable from colonial times, that rest on the ancient view that women's proper sphere is the domestic one.

Because sex-based employment discrimination stems from so long and deep-rooted a past, simple prohibition of its continuation is completely ineffective as a tool for improving the economic lot of women. Without specific numerical goals, the small but significant successes of recent affirmative action programs would not have been achieved. This is especially true in non-traditional employment, where barriers to women's entrance have been particularly strong.

III

The purpose of Title VII of the Civil Rights Act of 1964 was to overcome these effects of the "lengthy and tragic" history on the employment status of women and minorities. Congress also intended that the objectives of Title VII be achieved, as much as possible, through voluntary compliance on the part of employers and unions, without resort to the courts. Congress could not, consistent with these intentions, have intended at the same time to preclude use of effective remedies absent a finding or admission of violation of the statute.

The legislative history of Title VII, makes clear that Congress did not intend to prohibit reasonable, voluntary affirmative remedies involving numerical goals. To

the contrary, the one reference to "preferential treatment" (§ 703(j) of the Act) implies precisely the opposite. Congress' actions in amending Title VII in 1972 show, if anything, approval of affirmative action goals. Furthermore, this interpretation is supported by the guidelines that the Equal Employment Opportunity Commission, the lead enforcement agency in this area, has promulgated.

The standard for allowing affirmative action goals adopted by the majority below, however, effectively nullifies the Congressional purpose. If use of affirmative action goals depends on an admission or finding of discrimination under Title VII, then it is extremely unlikely that such actions will be undertaken voluntarily.

IV.

Whatever the boundaries for permissible numerical goals for women and minorities may be, the affirmative action provisions at issue here fall well within a protected "zone of reasonableness." The serious underrepresentation of blacks in the skilled trades at the Gramercy plant (even apart from the other indications of race discrimination on the part of Kaiser) makes out a prima facie case of discrimination under Title VII. Under these circumstances, Kaiser's affirmative action training program was the appropriate response. Moreover, the particular action taken here -- which afforded new training opportunities to whites as well as blacks -- was reasonably tailored to address the dearth of skilled black workers. So reasonable a program should not be held violative of the very statute with which it was designed to comply.

ARGUMENT

I.

INTRODUCTION

Recognizing that women and minorities have been the victims of a lengthy and unfortunate history of pervasive discrimination in the employment sector, Congress in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., made a national commitment to the achievement of equal opportunity in employment.[1/] At stake here is

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1/ Indeed, the commitment to equal employment opportunity is reflected in numerous federal statutes (e.g., the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1970)) and federal regulations (e.g., Federal Communications Commission, Equal Employment Opportunities, 47 C.F.R. § 21.307 (1977) and Economic Development Administration, Nondiscrimination, 13 C.F.R. § 311 (1978)) and in statutes guaranteeing equal employment rights in 45 states and the District of Columbia.

the permissibility, not of affirmative action generally, but of reasonable, limited affirmative action, arrived at through the collective bargaining process, designed to provide minorities and women with true equal employment opportunity by teaching them the skills which previous centuries of discrimination had denied them. Should this affirmative action provision be held unlawful, the Congressional purpose of insuring that women and minorities have the full economic and social benefits of integration into the workforce will be nullified.

The facts of this case illustrate sharply the need for some form of affirmative action to achieve improved workforce participation for previously excluded groups.

Kaiser Aluminum & Chemical Corporation ("Kaiser") operates a plant in Gramercy, Louisiana, a town with about 2,000 residents,

located about 50 miles from New Orleans.[2/] Kaiser's workforce is drawn from the surrounding two parishes, St. James and St. John the Baptist, which have a population that is approximately 46% black (Tr. 51). Yet in 1974, 16 years after the plant had opened -- and despite efforts motivated by a desire to increase and upgrade minority employment in compliance with the requirements of Executive Order 11246, as amended -- only five (approximately 2%) of the plant's 290 maintenance craft workers were black (Tr. 54).

Because, prior to the program at issue here, the Gramercy plant had provided no formal on-the-job training program in the skilled trades, the company's crafts workers were drawn almost exclusively from

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2/ Weber v. Kaiser Aluminum and Chemical Corp., 563 F.2d 216, 235 (5th Cir. 1977) (Wisdom, J., dissenting).

the pool of already qualified individuals in the surrounding community (Tr. 54-56). However, that available pool contained virtually only white males,[3/] for blacks, in southern Louisiana as elsewhere, had traditionally been excluded from all sources of training and experience in the trades.[4/] In fact, almost the only source of training available in the vicinity of Gramercy was the apprenticeship programs provided by the building trades, which black members "did not get into" until very recently (Tr. 56).

Under these circumstances, the creation of a training program, admission to which was explicitly tied to race (as well as to seniority and interest), was

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3/ Joint Exhibit A, "Stipulation" § 5 at 2.

4/ See infra, for a parallel discussion on women.

the only effective means that the employer and the union could use to erase the legacy of a "sorry record of continual exclusion."5/

The facts of this case are illustrative in another way, as well. Women, too, suffer the present-day legacy of a crippling record of employment restrictions that have had the effect of relegating them to the lowest-paying, lowest-status jobs.6/ Nowhere

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5/ Weber v. Kaiser Aluminum and Chemical Corp., 563 F.2d 216, 235 (5th Cir. 1977) (Wisdom, J., dissenting). Indeed, the underrepresentation of blacks here is the product of identifiable, specific discriminatory practices of the relatively recent past. There is even evidence that it resulted from Kaiser's own exclusionary practices. See pp. 77-86, infra.

6/ Time and again, this Court has acknowledged this "long and unfortunate history of sex discrimination" (Frontiero v. Richardson, 411 U.S. 677, 684 (1973)), and the resultant "disparity in economic condition between men and women" (Califano v. Webster, 430 U.S. 313, 317 (1977)). See also Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Kahn v. Shevin, 416 U.S. 351, 353 (1974).

is this more true than in the skilled trades, as the situation at Kaiser's Gramercy plant indicates. There is no indication in the record that any woman had ever held a skilled crafts position at the plant. Even the collective bargaining agreement affirmative action provision reflected the on-going near-total exclusion of women in this industry: the nation-wide agreement required that only 5% of the trainees be women as opposed to the 50% figure imposed for blacks (Tr. 62).

Contrary to the suggestion of Mr. Justice Powell in Regents of the University

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[Footnote continued]
Out of concern for this disparity, this Court has sought to compensate women by upholding the constitutionality of laws providing direct economic advantages to them. E.g., Kahn v. Shevin (remedial tax advantage to widows); Califano v. Webster (favorable old-age benefit calculation). In contrast, the affirmative action plan at issue here attempts to address the problem of poverty at its root, by providing training and employment opportunities. It presents the hope of a long-range cure, and not just a palliative.

Of California v. Bakke, __ U.S. __, 98 S. Ct. 2733, 2755 (1978), although the severity of treatment tolerated in the institution of slavery does not have identical parallels in the historic treatment of women, the oppression of women as a class has indeed been extremely pervasive and debilitating.7/ Certainly in the employment context, the historical reality for women has been a

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7/ It is noteworthy that women's subordinate status may have provided the model for the legal status of slaves:

> In the earlier common law, women and children were placed under the jurisdiction of the paternal power. When a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest and most natural analogy was the status of women and children. The ninth commandment -- linking together women, servants, mules, and other property -- could be invoked, as well as a great number of other passages of Holy Scripture.

G. Myrdal, An American Dilemma: The Negro Problem and Modern Domocracy 1073 (Twentieth Anniversary Edition 1964). See Frontiero v. Richardson, supra.

complex of legal and customary limitations, based on a false and restrictive perception of their proper and "natural" role in society, which has left a demonstrable, pervasive, and intractable legacy in the present-day workforce. One thing is clear: the employment patterns of women and blacks today are astonishingly similar, and both groups are severely disadvantaged.

America's promise of equal employment opportunity is meaningless as long as the present-day legacy of a history of exclusion from employment remains undisturbed. Action such as that taken in the present case, reasonably tailored to redress a particular effect of past exclusion, to wit, the lack of skilled minority and women crafts workers, must therefore be upheld. Only if such affirmative action is allowed will all individuals eventually be able to participate on an equal basis in employment.

II.

AFFIRMATIVE ACTION IS ESSENTIAL TO ACHIEVE THE FULL BENEFITS OF EFFECTIVE EQUAL EMPLOYMENT OPPORTUNITY.

A. Women As a Class Have Been and Continue To Be Severely Disadvantaged in Employment. 8/

The essential reality of women's position in the American economy today is that they represent the majority of the nation's poor. Women presently comprise two-thirds of all employees earning the

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8/ The history of discrimination and its legacy in the present employment status of blacks and other minorities in the United States present a similarly dismal picture. And minority women bear the burden of double oppression: their unemployment rate, for example, is three times that of white males. See n.22, infra. We anticipate that the parties and other amici will address the history and condition of racial and ethnic minorities more fully, however. We therefore confine ourselves to an analysis of the condition and history of women, which might otherwise not be presented to the Court.

minimum wage.9/ In 1976, 53.7% of adult women, but only 23.6% of adult men, had an annual income under $4,000. In 1975, 32.5% of all female-headed households lived below the federal poverty line, five times as many as male-headed households living below the federal poverty line. The situation for black female heads of households is even worse: 50.1% lived below the federal poverty line.10/

Women's poverty is the direct and inevitable consequence of their vastly inferior employment status. By every measure, women are on the lowest rungs of

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9/ U.S. Dep't. of Labor, Bureau of Labor Statistics, Employment and Earnings (June 1978).

10/ Maureen Whalen, Women, the Poorer Sex, 2, 6, 7 (National Council on Women, Work, and Welfare 1978). In 1978, 43% of women workers provided the sole support of their households. U.S. Dep't of Labor, Women's Bureau "Most Women Work Because of Economic Need," (Chart) (August 1978).

the employment ladder. While women are represented in increasingly large numbers in the labor force,[11] minority and white women alike remain confined to low-paying, low-status jobs with little or no realistic opportunity for advancement -- not by choice, but by operation of law and force of custom.

In 1975 women earned an average of only $7,531 -- 59% of men's average income of $12,770. Women college graduates' median earnings were $10,861, which was $1,909 less than the median for all men's earnings and $7,030 less than the median for men

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11/ As of November 1978, women represented 41.4% of all workers, and 50.5% of all adult women worked. U.S. Dep't of Labor, Bureau of Labor Statistics, Employment and Earnings at 47, Table A-40, and 68, Table A-42 (December 1978). Women's share of the labor force and their rate of participation in the labor force have been increasing steadily since at least the turn of the century. See, e.g., U.S. Dep't of Labor, Women's Bureau, 1975 Handbook on Women Workers, at 11, Table 2 (1975).

college graduates.[12] This earnings gap is widening: in 1955, men's earnings exceeded women's by 56.4%, while in 1974, men's earnings exceeded women's by 74.8% -- an increase of 18.4%.[13] The trend has continued despite the enactment of the Equal Pay Act in 1963 and Title VII in 1964, and the amendment of Executive Order No. 11246 to cover women in 1967.

The primary reason for this wage differential is that, for the most part, women work in a limited number of "women's jobs," which tend to be among the lowest-

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12/ U.S. Dep't of Labor, Bureau of Labor Statistics Report 536, Work Experience and Earnings in 1975 by State and Area, at 20, Table 5 (August 1978). Women have not earned more than 63.9% of men's income since 1955. U.S. Dep't of Labor, Women's Bureau, The Earnings Gap Between Women and Men 6 (1976).

13/ The Earnings Gap Between Women and Men, supra at 1, 6.

paying occupations.[14/] Over 25% of women workers are concentrated in occupations that are 90% or more female;[15/] 52% of women workers in 1960 were in occupations that were 70% or more female.[16/] The list of jobs in which women constitute the vast

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14/ Of course, even where women and men are employed in the same jobs, many women continue to be paid less, the Equal Pay Act notwithstanding.

15/ Hedges, "Women Workers and Manpower Demands in the 1970's," Monthly Labor Review 19 (June 1970).

16/ Oppenheimer, "The Sex-Labeling of Jobs," Industrial Relations 220 (May 1968). The sex-segregated structure of the American workforce has changed virtually not at all since 1900. Now as then, occupational segregation is so pronounced that it would require about two-thirds of women workers to change jobs for women's occupational distribution to match that of men. Simmons, Freedman, Dunkle, and Blau, "Exploitation From 9 to 5," Background Paper for the Twentieth Century Fund Task Force on Women and Employment Ch. 1 (1974), reprinted in B. Babcock, A. Freeman, E. Norton, and S. Ross, eds., Sex Discrimination and the Law 198 (1975) [hereinafter cited as Babcock et al.].

majority of workers is a litany of low-paid, low-status jobs in our society:[17/]

Secretaries	- 99.1% female
Prekindergarten and Kindergarten teachers	- 98.7%
Housekeepers	- 97.2%
Telephone Operators	- 95.3%
Sewers and Stitchers	- 95.2%
Keypunch Operators	- 93.2%
Waitresses	- 90.4%
Bookkeppers	- 90%
Cashiers	- 87%

At the same time, women's under-representation in the professions and highly-skilled, highly-paid blue-collar jobs is as dramatic as their saturation in low-paid, low-status jobs. In the professions, in 1970, women were only 3.6% of architects, 4.9% of lawyers and judges, 9.3% of physicians, and 1.6% of engineers.[18/] In

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17/ U.S. Dep't of Labor, Bureau of Labor Statistics, Employment and Earnings 153-54 (January 1978).

18/ Economic Report of the President, "Economic Role of Women" at 155, Table 33 (1973).

the trades women represent only 0.9% of carpenters, 0.2% of electricians, 0.5% of plumbers and pipefitters, and 1.6% of nonautomotive mechanics.[19/] Women currently constitute a miniscule portion of trainees in skilled crafts apprenticeship programs.[20/] Even in predominantly "women's" industries, women are substantially under-represented in the higher-level, higher-paid managerial positions. In many industries, large numbers of women are employed as clerical workers,

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19/ U.S. Dep't. of Labor, Bureau of Labor Statistics Employment and Earnings, supra at 153-54. The Department of Labor recently promulgated regulations requiring three-year hiring goals for women in construction, stating, "[a] review of statistics relating to women in the construction industry shows an almost total exclusion of women from employment." 43 F.R. 14899 (April 7, 1978) (to be codified in 41 C.F.R. § 60) (emphasis supplied).

20/ As of the end of 1977, women were only 2.2% of all apprentices nationwide. Even this figure is skewed by the large numbers of women in more traditionally female apprenticeships, such as that of barber/beautician. Although close to 60% of the apprenticeable trades are in the construction field, in 1977 only 1.06% of construction apprentices were women. "State and National Apprenticeship Report" for January 1, 1977-December 31, 1977.

while men fill managerial positions.[21/] The profile of women in the labor force is thus characterized by near-universal vertical stratification within occupations as well as by horizontal occupational isolation.

Another important indicator of women's inferior employment status is their unemployment rate, which in 1977 was 8.2%, 1.32 times men's rate of 6.2%.[22/] This

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21/ In 1971 60% of the women workers classified as "white collar workers" held clerical jobs, while over 70% of men so classified held professional, technical, or managerial positions. U.S. Dep't of Labor, Manpower Administration, Manpower Report of the President (1972). In the banking industry in 1975, although 63% of all employees were women, 83% of all office and clerical workers, but only 1.8% of all senior officers, were women. T. Simcich, Council on Economic Priorities, Shortchanged Update 6-8 (1976).

22/ Forty-four percent (3.4 million people) of the unemployed population in 1975 were women. Nearly one-half million of these were family heads. The unemployment rate for women family heads was 10%, compared with 6% for male family heads. U.S. Dep't of Labor, Women's Bureau, Women Workers Today (1976). When broken down by race and ethnic categories, the unemployment

unemployment measure includes only persons actively looking for work or waiting to be called back to a job from which they had been laid off; it does not reflect the potentially great number of "discouraged workers" who do not look for work because they perceive -- often on the basis of long but unsuccessful job-seeking -- that they have little or no chance of obtaining employment. Research indicates that a disproportionat number of such discouraged workers are women and minorities.[23/]

[Footnote continued]
disparity shows the increased hardship for minority women: black women's unemployment rate was 3.2 times that of white (majority) men; Puerto Rican women's, 3.78 times; Mexican American women's, 2.52 times; American Indians' Alaskan Natives', 2.64 times. Even white (majority) women's unemployment rate was nearly 1.5 times that of white (majority) men. United States Commission on Civil Rights, Social Indicators of Equality for Minorities and Women at 30, Table 3.1 (August 1978).

23/ Social Indicators, supra at 28-29.

The pervasiveness of occupational segregation and the extent of unemployment among women establish that women do not truly have employment opportunities equal to -- or even approaching -- those of men. Working women also are severely handicapped in career advancement by a panoply of factors that tend to limit their work experience. As one commentator noted, "[a] description of the characteristics of 'women's occupations' reads like an inventory of disincentives [to positive work motivation]."[24/] These characteristics include disadvantageous assignment of work tasks to women;[25/] the

24/ Laws, "Work Aspiration of Women: False Leads and New Starts," 1 Signs: Journal of Women in Culture and Society No. 3, Part 2 at 33, 42 (Spring 1976) (emphasis in original).

25/ E.g., Payne v. Travenol Laboratories, Inc., 416 F. Supp. 248 (D. Miss. 1976) (women excluded from material handler jobs because those with heavy lifting jobs got available vacancies); Jordan v. Wright, 417 F. Supp. 42 (D. Ala. 1976) (policewomen not assigned to patrol, traffic, detective, or administrative divisions or to bureau of special

lack of successful career women to provide role models for working women; the lack of potential rewards -- e.g., increased pay, prestige or autonomy -- for excellent work;[26/] and sexual harassment and intimidation on the part of male superiors and co-workers.[27/] For women in non-traditional jobs, the negative impact of these factors is often aggravated.

[Footnote continued]
investigation). Subtle (or not so subtle) sexism in work assignments may have the effect of limiting women's promotional opportunities, since women may be prevented thereby from attaining work experience necessary for career advancement.

26/ Laws, supra at 41-42.

27/ Recent studies show that the incidence of sexual harassment in the workplace is very high, with findings ranging from 49% to 88%. In one study, all 401 working women interviewed stated they had suffered sexual harassment at work. Evans, "Sexual Harassment: Women's Hidden Occupational Hazard," in The Victimization of Women at 203, 204 (J.R. Chapman and M. Gates, eds. 1978).

B. Women's Present Employment Status Is the Product of a Long and Unfortunate History of Legal and Societal Discrimination.

Women's dismal employment picture did not arise in a vacuum. Rather, women's economic inequality is the inevitable product of a social structure which traditionally has excluded them from all "instrumental roles in political and economic life,"[28/] and a legal system which historically has relegated women to the status of little more than the domestic appendage to their husbands. Women's position has been justified by resort to the argument that their "natural" -- and therefore only permissible -- roles are those related to their biological maternal functions.

28/ Lapidus, "Occupational Segregation and Public Policy: A Comparative Analysis of American and Soviet Patterns," 1 Signs: Journal of Women in Culture and Society No. 3, Pt. 2 at 121 (Spring 1976).

In colonial times, women worked both in domestic employment and, to some extent, for pay outside the home.[29/] In the nineteenth century, as factory jobs and some educational opportunities[30/] began to open up to women, women increasingly worked outside the home. But most available jobs involved work that was an extension of housework -- e.g., in laundries, canneries, or textile and clothing industries -- and paid barely subsistence wages; the justification for low wages for women's work was the myth that women's employment was only temporary because they would soon get married, revert to their "true" vocation, and be supported

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29/ B. Wertheimer, We Were There: The Story of Working Women in America 12-13 (1977). See also, Hartmann, "An Historical View of Women's Work in the United States," 70 Current History 215, 216-17 (May 1976).

30/ E. Flexner, Century of Struggle, esp. Chap. II (rev. ed. 1975).

by their husbands.[31/]

Women were excluded by prevailing practice and by law from pursuing vocations other than the relatively low-paid ones acceptable for women. They were almost universally barred from practicing law, and the Supreme Court upheld these restrictions.[32/] Individual women's struggles to become doctors,[33/] and even to speak

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31/ Baxandall, Gordon, and Reverby, eds., America's Working Women: A Documentary History -- 1600 to the Present xv (1976). The basis for this argument -- that women don't need to work because men support them -- has been called the "fiction of the male head of household," because in any period of history for which data is available, between one-fifth and one-half of all heads of households were women. Boulding, "Familial Constraints on Women's Work Roles," 1 Signs: Journal of Women in Culture and Society No. 3, Part 2 at 95, 102-03 (Spring 1976).

32/ Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

33/ Flexner, Century of Struggle p. 117-24 (rev. ed. 1975).

publicly[34/] illustrate that occupational choice was extremely limited for all women.

Even in traditional women's occupations, only young, single women were expected to work, and then only temporarily.[35/] Teachers in many places were required by law to retire upon marriage.[36/] When women first entered factory work, boarding-house communities were set up to accommodate young, single women.[37/] The entire system contemplated the use of cheap, temporary female labor.

34/ See, e.g., G. Lerner, The Grimke Sisters of South Carolina (1967).

35/ The average working period for women at the turn of the century was between the ages of 15 and 25. Babcock, et al., supra at 24.

36/ B. Werthheimer, supra at 244.

37/ See B. Werthheimer, supra at 62-64.

Woman's position as belonging "in the divine ordinance, as well as in the nature of things" primarily to "the domestic sphere" (Bradwell v. Illinois, supra, 83 U.S. at 141 (Bradley, J., concurring)) was reinforced by legal and social restrictions in other spheres. Political disenfranchisement until 1920 was accompanied by limitations on women's legal rights that were the legacy of the common law. In all realms of their lives, women were subject to de jure restrictions that reduced them to the status of second-class citizens:

> By marriage, a woman lost the power to make enforceable contracts with other persons, including her husband, to retain her wages from work outside the home, to be paid for domestic work in the home, to sue and be sued, to manage and control her real property, to own personal property, to assert her claims in land or in equity or to receive the proceeds, to make a will or to choose her own domicile.[38/]

38/ Babcock, et al., supra at 562.

As the incidence of women's employment increased in the late nineteenth and early twentieth centuries, widespread enactment of "protective" labor legislation served further to limit their employment opportunities.[39/] Many state laws excluded women outright from "men's jobs" such as policing, mining, and bartending. The Supreme Court upheld such total exclusions against Equal Protection challenges as late as 1948.[40/]

Many states also passed legislation to reduce the intolerably long hours and to ameliorate poor working conditions prevailing in women's industries.[41/] While

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39/ For a review and analysis of such protective labor laws, see Babcock, et al., supra at 26-41.

40/ Goesart v. Cleary, 335 U.S. 464 (1948).

41/ By 1908, 19 states had enacted laws prohibiting night work or setting maximum hours for women. Babcock et al. at 28; see Muller v. Oregon, 208 U.S. 412, n.1 at 419 (1908).

such laws may have improved women's lot on the job, they also disqualified women from many higher-paying jobs, such as newspaper printers, street car conductors, and telegraph messengers, which required longer or different hours than those the laws permitted. For other jobs, women's competitive position vis a vis men was weakened by their legal incapacity to work longer hours.

Indeed, despite authority of this Court upholding maximum-hour legislation for women (Muller v. Oregon, 208 U.S. 412 (1908)), and later maximum limitations on men's work-hours (Bunting v. Oregon, 243 U.S. 426 (1917)), protective legislation for men was neither advocated by the labor movement nor enacted by legislatures. Unions did, however, support "protective" laws for women, recognizing that the interests of their predominantly male members would best be served by restrictions on their

lower-paid female competitors in the labor market.[42/]

Unions' discrimination against women has taken many other forms as well. Women have been excluded altogether from some unions, hindered in the formation of independent locals, organized into separate but unequal locals, and charged high dues or given low benefits. Unions have failed to organize women, barred women representatives from labor conventions, failed to

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42/ Babcock et al., supra at 36-37. The president of the Cigarmakers International Union made this view explicit in 1879:

> We cannot drive the females out of the trade, but we can restrict their daily quota of labor through factory laws. No girl under 18 should be employed more than eight hours per day; all overwork should be prohibited. . . .

J. B. Andrews and W. D. P. Bliss, History of Women in Trade Unions, 10 Report on Condition of Woman and Child Wage-Earners in the United States.

support women's strikes, and supported occupational segregation and lower wages for women in collective bargaining.[43/] Union leaders' attitude toward women mirrors the view of women's place prevailing in the late nineteenth and early twentieth centuries:

> The growing demand for female labor . . . is an insidious assault upon the home; it is the knife of the assassin, aimed at the family circle -- the divine injunctions. It debars the man through financial embarrassment from family responsibility, and physically, mentally and socially excludes the women equally from nature's dearest impulse.[44/]

43/ See Chafe, The American Woman: Her Changing Social, Economic, and Political Role, 1920-1970 76-77 (1972); Babcock, et al. supra at 25; Falk, "Women and Unions: A Historical View," 1 Women's Rights Law Reporter 54 (1973).

44/ E. O'Donnell [Secretary of Boston Central Labor Union], "Women as Bread Winners -- the Error of the Age," American Federationist 4 (No. 8), October 1897, reprinted in Baxandall, et al., supra at 167, 168. Contemporary and present-day observers alike have attributed the unions' attitude toward women to (as one put it) "a tacit understanding in the great brotherhood of man, that woman's place was in the home." Wolfson, "Trade Union Activities of Women," 143 Annals 123 (May 1929) quoted in Babcock, et al., supra at 25.

Because unions often provide the major source of training in skilled trades, their exclusion of women has the further consequence that very few women have developed such specialized skills. Indeed, the lack of a qualified pool of women applicants is apparent in this case.

In the twentieth century, legal and social mechanisms restricting women's employment have persisted, despite the influx of women into the workforce (and into non-traditional jobs) caused by the two World Wars.[45/] Even during the Wars, discrimination against women remained rampant, especially in compensation. Social pressures

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45/ During World War II, 6.5 million women entered the labor force -- an increase of 57%. Two and one-half million took manufacturing jobs, two million clerical jobs. Chafe, supra, at 148.

against women's employment, expressed, for example, in popular media exhortations to women to fulfill their "highest purpose" through marriage, motherhood, and homemaking, were prevalent after the First World War.[46/]

These social attitudes were also expressed as legal barriers. Broad federal anti-nepotism legislation in effect during the 1930's served to push working wives out of the civil service. Many states and local jurisdictions "embarked on crusades to fire working wives."[47/] In 1930-31, 77% of school systems refused to hire women

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46/ Id. at 97-111. Even the women's colleges adopted special home economics programs to "educate" women to their proper roles.

47/ Id. at 108. Almost every state considered legislation to restrict the employment of married women. Such bills were enacted in about a dozen states.

who were married; 63% dismissed women teachers who married.[48/]

The end of World War II produced similar barriers to the continued employment of women war workers. Great numbers of women lost their jobs to men returning to the civilian labor force.[49/] Nor did that war appear to have a great, lasting impact on societal attitudes regarding women's proper role.[50/]

48/ Ibid.

49/ The enactment of veterans' preference laws also reduced women's employment opportunities. By granting veterans permanent employment and retention preferences in competitive government service, such laws severely limit federal and state job opportunities for women, the vast majority of whom are not veterans.

50/ Post-war public opinion surveys, for example, indicated that the majority of Americans opposed working wives. Chafe, supra at 178. See also L. J. Rupp, Mobilizing Women for War: German and American Propaganda, 1939-1945 (1978). Rupp argues that public attitudes regarding women's proper work allowed women to be man's "helpmate" in the war effort; no

Thus, the history of women's employment -- indeed, of the social, political, and economic status of women -- reflects a near-complete exclusion of women from any employment opportunities except the lowest-status and worst-paid. This exclusion is based on and justified by a complex of stereotypical and out-dated views about women's "nature."

Working women feel the effects of their unfortunate history today. Despite the enactment of laws prohibiting sex discrimination in employment, women's segregation into "women's jobs" remains extreme; the wage gap between women's and men's salaries has been increasing, not decreasing,

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[Footnote continued]
fundamental change in the belief that woman's primary role is as man's helpmate was necessary to achieve increased levels of women's mobilization. But cf. Chafe at 183-84.

in the last two decades; and much discriminatory treatment and attitudes remain unredressed and unchanged. Present measures to achieve true equal employment opportunity for women must be measured against this historical and economic background.

C. Given the Deep-seated, Pervasive, Discriminatory Employment Legacy, Affirmative Action Including Specific Numerical Goals Is the Tool Proven Necessary to Realize Equal Employment Opportunity.

Announcing the signing of Executive Order 11246 in 1965, President Lyndon Johnson observed that even if the rules are the same for all, a race cannot be run fairly unless the starting-line is the same for all.[51/] His observation has proved prescient

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51/ L.B. Johnson, "To Fulfill These Rights," 2 Public Papers of the President 1965 636 (June 4, 1965).

with respect to attainment of true job equality. Government prohibition of discrimination alone is not sufficient to achieve a job market that offers equal opportunity to women and minorities. Rather, the available evidence compels the conclusion that the national policy of which Title VII and Executive Order 11246, as amended, are an expression will not be achieved without affirmative action.

The primary reason that injunctions against discrimination are not enough was recognized by this Court in 1974. Discussing remedies for sex-based employment discrimination, Mr. Justice Douglas pointed out that "firmly entrenched practices are resistant to * * * pressures [such as Title VII's prohibition of sex discrimination]."[52/]

52/ Kahn v. Shevin, 416 U.S. 351, 353 (1974).

The history of women's exclusion from most spheres of employment illustrates just how "firmly entrenched" the practices and attitudes that exclude women are. The common belief learned by example in earliest family experience and confirmed in nearly every subsequent encounter -- that "woman's place is in the home" -- is too ingrained to be easily undone. Such attitudes are so deep-rooted that often an employer does not even realize that his perceptions and decisions about the performance of an individual woman employee are based on false stereotypes.53/

Long experience, attained in efforts

53/ The literature documenting the "undervaluation" of women's work is voluminous. See, for example, R. Kanter, Men and Women in Organizations (1977); L.R. Walum, The Dynamics of Sex and Gender: A Sociological Perspective (1977); C. Epstein, Woman's Place (1970); V. Gornick and B. Moran (eds.), Women in Sexist Society (1971).

to improve the employment status of both blacks and women, confirms that orders of non-discrimination alone are not sufficient. The experience of the judiciary itself suggests that the cure for discriminatory policies often requires more than a mere injunction against illegal conduct. Courts have often ordered programs with specific numerical hiring or promotion goals where simple non-discrimination orders have proven ineffective. For example, in Morrow v. Crisler,54/ the court of appeals required the Mississippi State Highway Patrol to adopt a temporary hiring quota where the district court's order, enjoining discrimination and mandating a recruitment program for blacks, had failed to produce more than six black officers (out of 91 newly-hired officers) in two years. Part

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54/ 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974).

of the reason for the court's holding rested on its doubt that "benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi."55/

Specific numerical hiring goals succeed where non-discrimination injunctions fail because they provide a mechanism for addressing precisely those aspects of discrimination that are based on "entrenched" behavior and beliefs. First and most important, numerical goals provide specific benchmarks by which non-discrimination can be measured. Second, it is well documented

55/ Id. at 1056. See also United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973), in which the court approved an order mandating specific goals and timetables when an 800-member union failed to increase its black membership to more than ten black members in the four years after it had been enjoined from discriminating.

that women and minorities are deterred from even seeking employment by their conviction that no jobs are available to members of their class. Public awareness of a commitment to hire (or, as in this case, to train) a specific number of women and blacks may begin to reduce the built-in discouragement that years of negative experience have created.56/ Third, the

56/ The court in Morrow v. Crisler, supra, recognized this factor when it ordered adoption of a hiring goal for blacks. See supra at 46. See also Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Affidavit of John M. Heneghan ¶ 10, filed in Advocates for Women v. Marshall, Civ. Action No. 76-0862 (D.D.C. February 4, 1977) (App. B, infra at B-6 - B-7).

A recent study establishes clearly the relationship between affirmative action assurances and job-hunting incentives. When women job seekers were informed that "federal law now requires that companies train and hire a certain percentage of women" for construction jobs each year, 70% of the women expressed interest in those jobs (1-1/2 times as many as those in a control sample who were not given the affirmative action notice). D. Bem and S. Bem, "Are Women Interested in Construction Jobs: the Role of Affirmative Action" (Stanford University, Department of Psychology 1977).

results of such affirmative action do not depend on individual complainants bearing the burden of proving that discrimination has occurred.[57/] Finally, it is only when a specified number of women and blacks are brought into a workplace that the stereotypical assumptions of their co-workers and supervisors will be challenged.

Thus, available results of the most recent affirmative action plans designed to bring women into non-traditional fields show that adoption of specific numerical goals produces substantial results, compared

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57/ See, e.g., U.S. Commission on Civil Rights, Jobs and Civil Rights 47-48 (1969). In addition to the difficulty of proving discrimination, the poverty of the discriminatee, the difficulty of finding a lawyer, the sense of futility engendered by the life experiences of individuals in disenfranchised groups, and the fear of retaliation may also provide strong disincentives to bringing charges.

with the inefficacy of other known techniques. In California, for example, the State Department of Industrial Relations required local labor-management coordinating committees to set local "realistic goals and timetables" for women's participation in apprenticeship programs in January 1976. By November of 1978, the number of active women apprentices had more than doubled, although for the nine years preceding the requirement female apprenticeship had remained at about the same level.[58/] Similarly, within four years after the Maritime Administration of the United States Department of Commerce began to require that federal contractors under its

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58/ State of California, Department of Industrial Relations, Division of Appenticeship Standards, "Growth of Women Apprentices in California 1967-1978" (chart, February 4, 1977). This data was brought up to date with information supplied by the Research Director of the Department of Industrial Relations on January 19, 1979.

jurisdiction satisfy goals and timetable requirements for women in blue-collar occupations, the percentage of women in such positions jumped from 0.3% to 4.7%.[59/]

American Telephone & Telegraph Company's compliance under its 1973 consent decree with the Equal Employment Opportunity Commission and the Department of Labor provides the final example of the impact of specific, numerical affirmative action. During the six years of that decree's term, women's representation in management increased from 2.1% to 6.9%; in outside craft positions, from 0.2% to 3.9%; and in inside craft positions, from 6.5% to 17.2%.[60/] According to the president of

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59/ Affidavit of John M. Heneghan, supra, ¶ 7, App. B, infra, at B-4 - B-5.

60/ Final Report filed in Equal Employment Opportunity Commission et al. v. American Telegraph & Telephone Co., Civil Action No. 73-149 (E.D. Pa. Jan. 17, 1979). The validity of this consent decree was upheld

the board of A.T.&T., the real benefits of the decree arose from its facilitation of employees' movement into new and non-traditional jobs.[61/]

The overwhelming consensus of private projects working to improve employment opportunities for women is the same: without specific numeric goals, women would simply not be placed in non-traditional jobs.[62/]

[Footnote continued]
in Equal Employment Opportunity Commission v. American Telegraph & Telephone Co., 556 F.2d 167 (3rd Cir. 1977), cert. denied, __ U.S. __, 98 S. Ct. 3145 (1978).

61/ C. Loomis, "A.T.&T. in the Throes of Equal Employment," 99 Fortune 44 (January 15, 1979).

62/ A number of projects geared specifically to placement of women in non-traditional fields join this brief as amici. They include: the Chicana Service Action Center of Los Angeles; the Creative Employment Project of Louisville; Skilled Jobs for Women, Inc., of Madison, Wisconsin; the Women in Apprenticeship Program, Inc. of San Francisco; the Women in Construction Project of Boston; Women Working in Construction of Washington, D.C.; the Women's Division of R.T.P. [Recruitment and Training Program], Inc., of New York City; and the

This is particularly true of minority women, who face double discrimination in the workplace. Moreover, it is even true where such projects provide counseling and training for both employees and employers to assist in the integration of women in the workforce. Indeed, if courts and administrative agencies did not impose specific numerical goals on employers and unions, thereby frequently motivating other employers and unions to adopt them voluntarily, it is doubtful that any gains could be made at all.

Both the inefficacy of other remedies, and the initial empirical successes of these remedies, compel the conclusion that the traditional barriers to women's employment in non-traditional occupations are most effectively removed through use of numerical goals and timetables for women's

[Footnote continued]
YWCA Women's Trade Center of Bellingham, Washington.

participation at entry levels. To outlaw their use would signal the death knell for present efforts to integrate minority and white women into the mainstream of the American workforce.

III.

THE USE OF AFFIRMATIVE ACTION GOALS IN THE ABSENCE OF ADMISSION OR FORMAL FINDING OF PRIOR DISCRIMINATION IS FULLY CONSISTENT WITH TITLE VII.

A. Affirmative Action Goals Are Consistent With the Purposes of Title VII.

In Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971), this Court stated:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

The legislative history establishes beyond

any doubt[63/] that Title VII was chiefly designed to remedy the exclusion of blacks, women and other disadvantaged groups from the full benefits of employment.[64/]

Moreover, when Congress undertook to strengthen Title VII by passing the Equal Employment Opportunity Act of 1972, P.L. 92-261, it relied on data showing "the economic disparities which presently affect this Nation's minorities and women" and the disproportionate under-representation of minorities in occupational groups (including craftsmen) as indicating that Title VII had so far failed to achieve its

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63/ See, e.g., H.R. Rep. No. 914, 88th Cong., 2d Sess. at 18-26 (1963).

64/ Of course, white males may in a proper case claim the protection of Title VII. McDonald v. Santa Fe Trial Transportation Co., 427 U.S. 273 (1976). The Court in that case specifically reserved the issue of the legality of race-conscious employment decisions made pursuant to an affirmative action program. Id. at 281 n.8.

objective.[65/] These same Congressional Reports noted a shift in the perception of what constitutes discrimination:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization * * * Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.[66/]

It is apparent, therefore, that

65/ See S. Rep. No. 92-415, 92d Cong., 1st Sess. 6-7 (1971) and H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4 (1971).

66/ S. Rep. No. 92-415, supra at 5.

Congress viewed Title VII as a means of correcting the under-representation of minorities and women in employment, caused by historical discrimination and maintained by neutral "systems" and "effects," at least as much as a means of redressing individual acts of discrimination.

It is also apparent that Congress intended to encourage voluntary action on the part of employers as the most desirable method of achieving the purposes of Title VII. As this Court recognized in Alexander v. Gardner-Denver Co., "cooperation and voluntary compliance were selected as the preferred means for achieving this goal," and the Act created "an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit."67/

67/ 415 U.S. 36, 44 (1974).

Even after the Equal Employment Opportunity Act of 1972 gave the Equal Employment Opportunity Commission the power to seek enforcement of Title VII through suits in federal district court, the preference for voluntary compliance was retained. In Albemarle Paper Co. v. Moody, this Court pointed out that back pay awards are an important method of effectuating this purpose:

> [They provide] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.68/

This preference for voluntary compliance was a practical necessity as well as an exercise in governmental restraint. If redress of discrimination

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68/ 422 U.S. 405, 417-18 (1975).

and its attendant effects had in every case to be accomplished by judicial enforcement, this highest priority would not be accomplished for generations and would place a most severe burden on the already overburdened federal judiciary. Congress therefore clearly hoped that employers and unions would take note of the statute itself and the developing case law which interprets it, and undertake self-examination and correction accordingly. Were appropriate remedies for disadvantaged groups available for use only after a finding or admission of guilt, there would be no incentive for employers and unions to correct employment disparities voluntarily. Congress must therefore have intended all such remedies to be available for immediate and voluntary use.69/

69/ Such voluntary action, if undertaken promptly, can generally be less drastic and more finely tuned to the needs and

B. Congress Did Not Intend That Title VII Forbid Affirmative Action Goals.

Congress not only intended Title VII as a catalyst to voluntary action to correct the historic exclusion of women and minorities from employment, but also interpreted it to permit the use of goals and timetables to increase the employment opportunities of minorities and women.

Three main factors compel this conclusion. First, the wording of Title VII as adopted in 1964, stating that such preferences were not "required" by the Act, necessarily implies that they were permitted. Second, in debating the 1972 amendments to Title VII, the Senate repudiated an amendment specifically designed to prevent

[Footnote continued]
practices of the industry than the relief which a judge would appropriately order if the employment practices were permitted to persist until litigation was completed.

the United States from seeking such goals in Title VII suits or requiring them of government contractors under Executive Order No. 11246, 3 C.F.R. 339 (1965), as amended by Executive Order No. 11375 (1967).[70/] Finally, the Equal Employment Opportunity Commission, the agency charged with enforcing Title VII, has published Guidelines interpreting the Act as permitting the voluntary adoption of such goals in circumstances like those presented here. We now consider each of these factors in turn.

Title VII addresses the question of racial and sexual preferences to correct underutilization in an employer's workforce or union's membership in only one place. Section 703(j) of the Act states that

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70/ Executive Order No. 11375 amended Executive Order No. 11246 to include sex as a prohibited basis for discrimination.

"nothing contained in this title shall be interpreted to require" the grant of preferential treatment because of an imbalance in the numbers of persons of any race, religion, color, sex or national origin employed or enrolled compared to their percentage in the population or workforce as a whole. 42 U.S.C. 2000e-2(j) (emphasis supplied). While this subsection makes it clear that Title VII does not impose remedial goals as a duty, it also by implication establishes that such goals are not outlawed by the Act. Had Congress intended a flat prohibition of such affirmative action efforts, it could easily have achieved that aim by the addition of the words "or permit" to the above-quoted portion of the subsection. That it did not do so, despite lively Congressional debate regarding remedial hiring, is surely significant.

This conclusion was indirectly confirmed in 1972 when Congress addressed a number of proposed amendments to Title VII.

Between the time Title VII was enacted and the time when it was amended by the Equal Employment Opportunity Act of 1972, the question of affirmative action goals had come to the attention of the public, the courts, and Congress in two separate contexts. First, the Office of Federal Contracts Compliance, in enforcing the strictures of Executive Order 11246, as amended, against discrimination by government contractors, had required that construction contractors submit with their bids acceptable affirmative action programs, including specific goals for minority manpower utilization. The reason for imposing these goals for the hiring of minority craft workers was the finding that minorities

had been excluded from the building trades by past discrimination, not on the part of the construction contractors themselves, but on the part of the crafts unions whose hiring halls furnish employees to contractors.[71/] Challenged in a number of such suits which alleged, inter alia, that they violated both Section 703(j), supra, and Section 703(a), the basic anti-discrimination provision of Title VII, these minority hiring requirements were consistently upheld.[72/]

71/ This recognition of past discrimination in the industry constitutes an administrative finding of discrimination which distinguishes the instant case from Regents of the University of California v. Bakke, __ U.S. __, 98 S. Ct. 2733 (1978).

72/ See, e.g., Contractors Ass'n of Eastern Pennsylvania v. Sec'y of Labor, 442 F.2d 159, 173 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971) ("To read § 703(a) in the manner suggested by the plantiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either

Second, a number of district courts had imposed numerical goals as part of the relief ordered to remedy discrimination found to have violated Title VII. The rationale behind such orders, which have become commonplace since 1972, is that the chancellor in equity has the power and duty to eliminate discrimination and its effects. These orders, too, repeatedly have been held consistent with Title VII.[73/]

[Footnote continued]
from the language of the statute or from its legislative history. * * * We reject the contention that Title VII prevents the President acting through the Executive Order program from attempting to remedy the absence from the Philadelphia construction labor of minority tradesmen in key trades."); Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Associated Gen'l Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973) cert. denied, 416 U.S. 957 (1974); Northeast Construction Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970).

73/ See, e.g., United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971); Norwalk CORE v. Norwalk Redevelopment Agency, 395

During the debate on the Equal Employment Opportunity Act of 1972, Senator Ervin offered an amendment that would add to Title VII a provision that:[74/]

> No department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular

[Footnote continued]
F.2d 920 (2d Cir. 1968); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1972); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir. 1972), cert. denied, 409 U.S. 851 (1972); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973); Morrow v. Crisler, supra, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); United States v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973); United States v. Local 212, IBEW, supra, 472 F.2d 634 (6th Cir. 1973); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); EEOC v. American Telegraph & Telephone Co., supra 556 F.2d 167 (3rd Cir. 1977), cert. denied, __ U.S. __, 98 S.Ct. 3145 (1978).

74/ Subcommittee on Labor of the U.S. Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 1039 (1972).

> race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges.

During the ensuing debate, Senator Javits called attention to Contractors Ass'n of Eastern Pennsylvania v. Sec'y of Labor, supra, and United States v. Ironworkers Local 86, supra, and advocated defeat of the proposed amendment because it would preclude the types of numerical goals approved in those decisions. Id. at 1046-47. He also noted that the amendment would preclude consent decrees binding employers to prefer women and minorities for a specific percentage of future vacancies to correct alleged but unproven and unconceded past discrimination. Id. at 1071-72. The amendment was overwhelmingly rejected. Id. at 1075.

By this action, the Senate

acknowledged court determinations that, at least where imposed by a court or federal agency, numerical or percentage affirmative action goals of the type adopted in the instant case are consistent with Title VII, and declined to overrule those court determinations legislatively. Moreover, the section-by-section analysis of the Equal Employment Opportunity Act of 1972 as finally adopted by both Houses of Congress establishes an intent to ratify these judicial decisions:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law developed by the courts would continue to govern the applicability and construction of Title VII.

Id. at 1844.

In the face of this legislative history, it is difficult to maintain that

Congress understood or intended Title VII to prohibit race- or sex-conscious efforts to remedy underutilization resulting from past discrimination, at least where these measures were judicially or administratively mandated. And, as noted above, the wording of Sec. 703(j) of Title VII suggests that such efforts are permitted (though not required) even where, as here, there is no judicial or administrative mandate.

The inference that Congress intended to permit private, voluntary affirmative action is bolstered by the EEOC Guidelines on Affirmative Action.[75/] As the administrative interpretation of the Act by the enforcing agency,[76/] these Guidelines

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75/ 44 F.R. 4422 (1979) (to be codified in 29 C.F.R. Part 1608).

76/ Executive Order No. 12067, 43 F.R. 28967 (1978), gave EEOC the authority to coordinate and "provide leadership" in the enforcement of all federal laws and regulations governing equal employment

are entitled to great deference.[77/] The Guidelines interpret Title VII as permitting

[Footnote continued]
opportunity. This reorganization thus confirmed and enhanced the Commission status as "the enforcing agency."

77/ Griggs v. Duke Power Co., supra, 401 U.S. at 433-434; Albemarle Paper Co. v. Moody, supra, 422 U.S. at 431. Although these Guidelines were adopted subsequent to the actions complained of in the instant case, and therefore cannot be relied on as a defense under Sec. 713(b)(1) of Title VII, the deference to which they are entitled is in no way diminished. This Court in Griggs similarly deferred to Guidelines published after the events in issue. 401 U.S. at 433, n. 9.

Nor is such deference diminished by General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), in which this Court declined to follow EEOC Guildelines on sex and national origin discrimination, respectively. In both those cases the Court noted that the Guidelines in question contradicted previous interpretations by the EEOC; moreover, in Gilbert they contradicted the Department of Labor's interpretations of the Equal Pay Act. Neither of these factors militating against deference are present here; on the contrary, the EEOC Guidelines on Affirmative Action are fully consistent both with its own prior interpretations and with the Department of Labor's OFCCP regulations implementing Executive Order 11246. See Revised Order No. 4, 41 C.F.R. Part 60-2.

an employer who discovers through self-analysis that his employment practices tend to have an adverse effect on the members of previously excluded groups, to adopt race- or sex-conscious affirmative action, including goals and timetables, to remedy the exclusionary effect. 29 C.F.R. 1608.4. An employer who finds that the available pool of qualified women and minorities is artificially limited because of historic restrictions may adopt training programs "which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions." 29 C.F.R. 1608.3(c). These steps may be taken without an admission or formal finding that the employer has violated Title VII. 29 C.F.R. 1608.4(b). As we demonstrate in Section III, infra, the actons of the Petitioners in the instant case are fully

consistent with the conduct which the Guidelines authorize.

C. To Require Admission or Formal Finding of Discrimination Before Affirmative Action Goals May Be Utilized is Impractical and Severely Undermines the Congressional Preference for Voluntary Compliance.

The requirement that a violation of Title VII be admitted or proved before affirmative action goals or quotas can themselves be found lawful under Title VII -- a requirement which the majority below would impose but which the Guidelines eschew -- is both impractical and inconsistent with the Congressional preference for voluntary amelioraton of the evils at which Title VII was directed. Its adoption would eliminate effective affirmative action.

Even those employers who recognize that their workforce statistics indicate a prima facie case of discrimination, and

who are aware of no justifying facts with which they could rebut the presumption so created, would be safer to continue the status quo. The possibility of a Title VII suit against them by women or minorities is clearly a more acceptable risk than to adopt affirmative action goals which would both create the risk of suit by whites or men and could be justified only by an admission of past discrimination, thus inviting a second suit and back pay liability to minorities or women.

The instant case well illustrates the point that discrimination may exist in the absence of admission or conclusive proof. Here the statistics for unskilled and craft jobs alike were such as to create a prima facie case of discrimination.[78/] Furthermore, there was no evidence

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78/ See infra at 77-78.

establishing the validity of either the procedures used to select unskilled employees, or the experience requirement used to select craft employees and trainees.

Both employer and union knew that these facts might render them vulnerable to a Title VII suit, and they were in the best position to judge whether they had any adequate defense to such a suit. Yet it was not in the interest of either of them to acknowledge or to prove at trial that they were discriminators. Still less was it in respondents' interest to prove discrimination on their part, since such proof would enhance the legitimacy of the disputed goals. The result here -- as might be expected in any "reverse discrimination" case -- was that no party marshalled the evidence for or urged a finding of past discrimination, and therefore the trial court found as an "undisputed fact" that

there was no past discrimination. The impracticality of requiring an admission or finding of discrimination to "legitimize" affirmative action goals could not be more convincingly illustrated.

The standard adopted by the majority below would not only bar voluntary affirmative action, but would prevent the compromise and settlement of Title VII actions through the adoption of consent decrees. Where the defendant employer believes his chances of prevailing in such a suit are slight, he is often willing to accede to a consent decree imposing negotiated and mutually acceptable relief. But since the defendant is naturally unwilling to admit discrimination in entering into such a decree, and the plaintiff would rarely be willing to accept a decree that did not impose corrective goals (which are the most effective means of correcting

discriminatory exclusion from employment[79/] and which are within the power of the court to grant to a prevailing plaintiff), settlement of Title VII class actions would be effectively precluded. Not only does this undercut "conference, conciliation and persuasion" as the preferred means for resolving Title VII disputes, but it places on the courts the considerable burden of having to try at least the issue of discrimination vel non in every Title VII class action filed. Congress could not have intended such a result.

IV.

AFFIRMATIVE ACTION GOALS LIKE THOSE IN THE INSTANT CASE WHICH ARE A REASONABLE REMEDY FOR UNDERUTILIZATION OR HISTORIC ARTIFICIAL EXCLUSION SHOULD BE PERMITTED, WITHOUT REQUIRING PROOF OR ADMISSION OF DISCRIMININATION.

While proof or admission of

79/ See Section II-C, supra.

discrimination is an unrealistic requirement on which to condition the legitimacy of sex- and race-conscious affirmative action, neither would it be reasonable for all types of preferences adopted by employers in all types of circumstances to be deemed unassailable under Title VII so long as they are termed "affirmative action." The answer, as Judge Wisdom suggested in his dissent below, is the recognition of a "zone of reasonableness" within which the employer and union would be sheltered from liability for their affirmative action efforts.

The EEOC Guidelines delineate the proper boundaries of such a "zone of reasonableness." They set two important limits on permissible affirmative action, defining when such action may be taken and what form it may take.

The Guidelines state that the employer

or union may take affirmative action if self-analysis discloses employment practices which: (1) have an adverse impact on previously excluded groups, or those whose opportunities have been artifically limited; or (2) leave uncorrected the effects of prior discrimination (as identified by a comparison between the employer's work force or a part thereof and an appropriate segment of the labor force); or (3) result in disparate treatment. 29 C.F.R. 1608.4(b).

It would be difficult to imagine a fact situation more clearly calling for affirmative action than the one which Kaiser and the Steelworkers faced during their 1974 contract negotiations. Both employment practices with an adverse impact on groups whose opportunities had been artifically limited, and practices leaving uncorrected the effects of prior discrimination, were

clearly present.[80] In short, even this meager record discloses a prima facie case of discrimination.

The work force in the two parishes from which Kaiser Gramercy drew its employees was 39 percent black (Tr. 50-51), but blacks comprised about two percent (5 out of 290) of Kaiser's craft employees (Tr. 54, 57), and no more than 10 to 11 percent of its production employees (Tr. 50), before the one-for-one hiring system for production jobs was begun in 1969. These figures by themselves make out a prima facie case of discrimination.[81]

80/ In contrast, there was no evidence in Regents of the University of California v. Bakke, supra, that the medical school had adopted admissions policies that were prima facie discriminatory against disadvantaged groups.

81/ Hazelwood School District v. United States, 433 U.S. 299, 308-09, n.14 and accompanying text (1977); Teamsters v. United States, 431 U.S. 324, 339, n.20 and accompanying text (1977).

Moreover, it does not appear that Kaiser could have rebutted the presumption of discrimination thus created. Prior to 1969 it had selected production workers by hiring the "most qualified" at the gate (Tr. 79); there is no evidence that the selection standards it used to determine qualification were validated.[82] Similarly, it had insisted upon previous craft experience as a prerequisite for hire into craft jobs. This requirement, certainly a "built-in headwind" for minorities and women,[83] cannot have been a business necessity,[84] since the 1974 contract

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82/ See Albemarle Paper Co. v. Moody, supra, 422 U.S. at 430-31.

83/ As Judge Wisdom observed below, judicial findings on discrimination in the crafts are so common as to make it a proper subject for judicial notice. 563 F.2d at 235.

84/ See Griggs v. Duke Power Co., supra, 401 U.S. at 431-32; Robinson v. P. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

recognized training as a feasible alternative.[85/]

Indeed, the federal agency charged with monitoring Kaiser's EEO performance as a government contractor had concluded that its employment practices did not comply with the non-discrimination requirements of Executive Order 11246, as amended, and its implementing regulations.

In 1971 and 1973, EEO compliance

85/ As Mr. Justice Powell noted in Regents of the University of California v. Bakke, supra, ___ U.S. ___, 98 S. Ct. at 2758, n.44, the presumption that disparate impact without any showing of business justification establishes the existence of discrimination in violation of Title VII "was based on legislative determinations, wholly absent [in Bakke], that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination." The absence of such "detailed legislative consideration of the various indicia of previous constitutional or statutory violations," (id. at 2755, n.41) in Bakke distinguishes it from the case at bar.

reviews of the Gramercy plant[86/] disclosed a number of violations, including inadequate recruiting, unvalidated experience requirements for entry into craft positions, and waiver of these experience requirements for white (but not for black) transferees.[87/]

Thus Kaiser and the USWA were confronted not merely with their own extreme underutilization of minorities and women, but with evidence sufficient (insofar as it is ever possible to foresee the outcome of litigation) to prove a violation of Title VII against them. Both employer and union

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86/ Documents pertaining to these reviews were lodged with the Clerk of this Court in connection with the Petition for a Writ of Certiorari filed by the United States of America and the Equal Employment Opportunity Commission.

87/ Such an administrative finding of discrimination establishes a predicate for race-conscious remedial action that was totally absent in Regents of the University of California v. Bakke, supra.

could not fail to be concerned that they ran the risk of a costly, embarrassing and morale-destroying Title VII suit,[88] and their concern was not unfounded.[89] Ordinary prudence (as well as the social

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88/ The union, in representing Respondent and the other white male employees who constituted a majority of its membership, must have been conscious that any back pay liability which might be assessed against it in the event of successful suit would be indirectly borne by its members; the consequences of any loss of governmental contracts by Kaiser through failure to comply with Executive Order 11246, as amended, would be felt even more directly by its members facing layoff.

89/ Contemporaneously with the case at bar, black employees of Kaiser in two other Louisiana plants filed employment discrimination suits. In one case, Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978), the court found a prima facie case of discrimination by company and union against blacks in hiring for craft positions on the basis of statistics similar to those present here. In the other, Burrell v. Kaiser Aluminum & Chemical Corp., Civ. Action No. 67-86 (M.D. La., February 24, 1975), a consent decree was filed on February 24, 1975 in which Kaiser agreed to pay $255,000 to the plaintiff class.

policy which generated Title VII) dictated that they should take steps to eliminate the imbalance which would be the chief evidence against them in the event of suit. Surely they should not have been prohibited from taking action in these circumstances, and thereby have been placed in the untenable position of having to choose by whom they would be sued first: blacks for discrimination, or whites for "reverse" discrimination.

Indeed, Kaiser did take limited action to redress the situation: for the noncraft jobs -- the production jobs -- it began hiring blacks and whites on a one-for-one basis in 1969. (Tr. 85). For these jobs it even ventured to hire four women (Tr. 61).

For the craft positions, Kaiser similarly had tried a number of

noncontroversial devices to increase black representation, such as advertising in black-oriented newspapers and undertaking to complete the craft training of production employees--white or black--who already had some such training (Tr. 55, 57, 68). Still, only five black craftsmen were hired.

In light of this statistical evidence, use of unvalidated selection standards with adverse impact on previously excluded groups, and failure of more limited efforts to correct the effects of such exclusion,[90/] Kaiser and the USWA clearly had a reasonable basis for undertaking affirmative action.

90/ The record contains, in addition, a virtual admission of past discrimination by the employer. Mr. Thomas M. Bowble, Equal Opportunity Affairs Director for the entire Kaiser Corporation (Tr. 96), testified that "I don't think there is any employer in the United States, prior to a given time in our history, that didn't practice employment discrimination in some form" (Tr. 125).

With regard to the proper boundaries of such action, the EEOC Guidelines provide that the plan may include the adoption of goals and timetables which are race- and sex-conscious and which enhance opportunities for members of groups which have previously been excluded. That action must, however, be directly tailored to solving the problems identified in the self-analysis, must be limited accordingly in duration, and must avoid unnecessary restrictions of opportunities for the workforce as a whole.

The plan adopted in this case was wholly consistent with these standards and admirably tailored to remedy the problem which the employer and union had identified and which more modest measures had failed to cure. Rather than depriving any employees of existing rights, it added new opportunities; rather than limiting these

opportunities solely to the under-represented classes, it afforded them to white males as well.

The 1974 contract provided for the first time that the plant would train bargaining unit employees who had no craft experience in the skilled crafts. Half the trainees were to be white and half black. (Joint Exhibit A, Stipulation 4.) Without this agreement, none of the Respondents would have had any opportunity for craft training.91/

Nor was there any question of preferring less qualified employees over

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91/ This expansion of opportunities for the workforce as a whole sharply contrasts with the minority preference in Regents of the University of California v. Bakke, supra, where the minority admissions program limited respondent's opportunity to enter medical school. Here, no expectations of white male workers were diminished by the mode of affirmative action adopted.

those more qualified. Qualifications played no part in the selection of employees for craft jobs; all transferees were unqualified when chosen and were to become qualified through training.

Finally, the program was limited in duration to the length of time necessary to correct the underutilization which prompted it.92/

Thus, the employer and union in the instant case proceeded reasonably in perceiving the need for affirmative action and in adopting an effective yet non-Draconian plan. Their action was fully consistent with the EEOC Guidelines, which

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92/ The national collective bargaining agreement requires that apprentice and craft jobs be filled on a one-for-one basis (at a minimum) "until the goal is reached." Joint Exhibit A, "Stipulation" § 4 at 2. Goals were set for each plant on the basis of the percentage of minorities in the available workforce. Tr. 51-52.

are themselves clearly consistent with Title VII and its legislative history. They are responsive to the needs of employers and unions, affording them an opportunity to take action which lessens the risk of successful suit by minorities, women or the Federal government without thereby increasing the risk of successful suit by white male employees. They accommodate the needs of white male employees, since they require affirmative action efforts to be limited in scope and duration to those reasonably necessary to correct the effects of discrimination and artificial exclusion. Finally, they are responsive to the needs of minorities and women, and to the national interest in halting the move toward two societies, separate and unequal, and moving instead toward one society with full

utilization and participation of all, regardless of sex, race, or national original.

CONCLUSION

For the reasons stated above, amici respectfully submit that the judgment and order of the court below should be reversed.

Respectfully submitted,

EILEEN M. STEIN
4720 Montgomery Lane
Bethesda, Maryland 20014

DONNA R. LENHOFF
WOMEN'S LEGAL DEFENSE FUND, INC.
1010 Vermont Avenue, N.W., Suite 210
Washington, D.C. 20005

PAT EAMES
SUSAN SILBER
WOMEN'S RIGHTS CLINIC
URBAN LAW INSTITUTE OF ANTIOCH SCHOOL OF LAW
1624 Crescent Place, N.W.
Washington, D.C. 20009

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APPENDIX

APPENDIX A

Statements of Interest of Individual Organizations Amici Curiae

Recognizing that role-typing by sex is a pervasive societal problem that affects women most harshly by confining their opportunities and chilling their aspirations, the ACLU established the ACLU Women's Rights Project to work toward the elimination of gender-based discrimination and the advancement of women's rights. The ACLU Women's Rights Project has participated in most of the cases before this Court challenging sex-based discrimination under the Fifth and Fourteenth amendments.

The Chicana Service Action Center, located in Los Angeles, California, is an advocate for the rights of Spanish-surnamed women in employment opportunities, career development, and higher education. It is committed to affirmative action to enable the doubly oppressed women who receive

neither equal pay for equal work nor equal employment in skilled crafts, administration and management.

The Creative Employment Project is an employment program in Louisville, Kentucky serving persons who are seeking non-traditional jobs and persons who are re-entering the labor force after a period of absence. It has offered vocational counseling; orientation, fitness and vocational training; and job development and job placement to approximately one thousand persons, primarily women; about half of its trainees have entered employment, hundreds in jobs that had previously been non-traditional for women. It presently operates a new apprenticeship and construction outreach program for women.

Equal Rights Advocates, Inc. is a public-interest law firm in San Francisco dedicated to the litigation of issues affecting women's rights. The great majority

of its cases involve issues of employment discrimination, especially in blue-collar nontraditional jobs.

Federally Employed Women is a nationwide organization with approximately 200 chapters. Its purpose is to take action to end sex discrimination in employment in the government service; to improve the merit system in the government service; and to increase job opportunities for women in government. It has run educational programs on affirmative action for both employees and employers, and has had direct contact with federal agencies in reviewing their affirmative action plans.

The Federally Employed Women's Legal and Education Fund is a nonprofit corporation formed for the purpose of eliminating discrimination in government employment, and defending human and civil rights. It regularly enters into proceedings where

the legal issues raise a question of opportunities for advancement in employment, particularly government employment, if unlawful discrimination is involved.

The League of Women Voters of the United States (LWVUS), is a nonpartisan, tax-exempt, nonprofit membership corporation with a current membership of 131,000 in 1,350 state and local Leagues. Since its inception in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government, and believes, among other things, that no person or group should suffer legal, economic or administrative discrimination, and that responsible government should be responsive to the will of the people.

The National Association of Black Women Attorneys, Inc. was formed in 1972 to increase the percentage of black women

in the administration of justice. Black women attorneys comprise a miniscule proportion of all lawyers in the United States. Its membership knows from firsthand experience that, because of the pervasive nature of racial and sexual discrimination in our society, the economic position of black women cannot be improved without voluntary affirmative action.

The National Conference of Puerto Rican Women, Inc. is a nonprofit, nonpartisan organization with chapters in seven cities and a membership of approximately 50,000. Its purpose is to attain equal rights for Puerto Rican and other Hispanic women in the United States, and to achieve their more equitable participation in the economic, social and political life of the United States. Its principal activities include the identification and development of women leaders; the establishment of lines of communication among Puertoriquenas devoted

to eradicating discrimination; and the development of programs on behalf of Puerto Rican women.

The National Federation of Business and Professional Women's Clubs, Inc. represents about 165,000 employed women in each Congressional District, the District of Columbia, the Virgin Islands, and Puerto Rico. As an organization whose main purpose is to elevate the standards for and to promote the interests of business and professional women, it works to secure equal treatment for women in all sectors of employment.

The National Organization for Women (NOW), is a national membership organization of women and men the purpose of which is to bring women into full participation in every aspect of American society. NOW has a membership of approximately 102,000, with 657 chapters throughout the United States.

Founded in 1965, it has been continuously involved in advancing the cause of equal employment opportunity.

The NOW Legal Defense and Education Fund is a nonprofit civil rights organization established in 1971, by leaders of the National Organization for Women, to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. The NOWLDEF has participated in numerous cases to secure enforcement of legal provisions barring employment discrimination.

National Women's Employment Project is a consortium of five working women's groups: Nine to Five in Boston, Cleveland Women Working, Dayton Women Working, Women Office Workers in New York, and Women Organized for Employment in San Francisco. N.W.E.P. and its member groups are committed

to ending discrimination in employment and improving working conditions for the fifteen million women working in offices in the United States.

The National Women's Political Caucus is a multipartisan organization. Its purpose is to obtain equal representation for women in government, and fundamental to that objective is the attainment of full economic equality for women. Only with economic equality will women be able to participate fully in the political process, and a commitment to economic justice is the priority for most women in public life. Voluntary affirmative action projects provide one of the most important mechanisms for securing equal economic opportunity that women have.

The Organization of Chinese American Women has over 1,000 members in 16 chapters throughout the United States. The organization's purpose is to integrate Chinese

American women into the mainstream of women's activities and programs, especially in employment; important to that objective is the elimination of stereotypes of Chinese Americans, racial discrimination and restrictive traditional beliefs. Through its programs, which include compilation of a talent bank of Chinese American women, assertiveness training and bilingual and bicultural training for Asian women, and a project to assist Asian women to achieve policy-making positions, the Organization has found that employed Chinese American women are especially affected by affirmative action, because they are concentrated in low-paying jobs in garment factories, restaurants, and clerical positions.

60 Words Per Minute is an organization of women office workers in Washington, D.C. Office workers are the largest occupational group in Washington, D.C. 60 WPM seeks to assure through action and education that

office workers receive the wages, respect and career opportunities their work deserves.

Skilled Jobs for Women, Inc., is a nonprofit career development and comprehensive employment service for women in Southern Wisconsin. The organization achieves a 60% employment placement rate for the women it serves, who are low income, unemployed, displaced homemakers, minorities, have multiple barriers to employment, or are seeking nontraditional blue-collar jobs and apprenticeships. Our efforts in the last three years to prepare and place women in nontraditional blue-collar jobs and apprenticeships have only been possible through labor and management cooperation in actively maintaining affirmative action recruitment and selection programs.

Wider Opportunities for Women, Inc. is an independent, nonprofit, tax-exempt organization which since 1964 has worked

to expand employment opportunities for women. During the past 15 years, WOW has provided job counseling, development, referral and training for thousands of women and hundreds of employers. WOW programs have created innovative ways to increase work opportunities for women, including special programs for disadvantaged women, ex-offenders, older women, high school girls, and handicapped women. WOW also conducts a national program linking over 80 women's employment organization throughout the country for increased advocacy on women's employment issues.

Women Employed is a Chicago-based organization of women office workers of over 500 members. To achieve meaningful employment opportunity for women, it provides educational and advocacy services to its members. Women employed has studied women's exclusion from high-level employment in the banking and insurance industries, and

five years of experience processing individual and class complaints before the Equal Employment Opportunity Commission and Office of Federal Contract Compliance.

The Women in Apprenticeship Program, Inc. is a nonprofit organization in the San Francisco area which focuses on assisting women who are interested in apprenticeship programs or wish otherwise to qualify for work in blue-collar jobs. For six years, it has assisted hundreds of women to gain access to apprenticeship and non-traditional employment.

The Women in Construction Project (WICP), is a Massachusetts-based, union-sponsored program of pre-apprenticeship skills training for women. Working with trade unions and contractors, WICP during the past year has trained and placed over 45 women in entry-level construction jobs as apprentice carpenters, electricians,

painters and plumbers. WICP's success in placing women in nontraditional jobs was due in great part to a cooperative effort between employer groups and WICP, and employers' support of the WICP program and its goals.

Women Working in Construction is a local, Washington, D.C. organization. In supporting women's efforts to find work in the construction field, it has sought to, and has secured, the legal enforcement of equal employment opportunity for women.

The Women's Division of R.T.P. [Recruitment and Training Program], Inc., of New York City, recruits, counsels and places minority women into nontraditional blue and white collar occupations. Since the inception of its blue-collar component ("Women in Apprenticeship") in 1975 and its white-collar component ("Minority Women Employment Program") in 1972, R.T.P. has

successfully placed approximately 3500 women into well-paying career-oriented positions within construction and other private industries.

Women's Equity Action League is a nonprofit nationwide membership organization incorporated under the laws of Ohio with national offices in the District of Columbia. Established in 1968, WEAL seeks to promote greater economic progress for women, to press for full enforcement of antidiscrimination laws on behalf of women, and to seek correction of de facto discrimination. WEAL has pursued these goals through litigation, through monitoring the enforcement activities of federal and state agencies, and through research and dissemination of information.

The Women's Equity Action League Educational and Legal Defense Fund is a nonprofit, tax-exempt association organized

to provide legal assistance and services to ensure the full participation and recognition of individuals in all facets of American life without discrimination based on sex.

Women's International League for Peace and Freedom was founded in 1915 by Jane Addams with the express purpose of maintaining peace and justice throughout the world. It is a nonprofit organization with over 10,000 members and 100 branches in the United States. It has been actively involved in the civil rights and women's rights movements since its inception.

The YWCA Women's Trade Center of Bellingham, Washington, assists economically disadvantaged, unemployed or under-employed women so that they will be able to obtain the higher paying jobs that are traditionally open only to men. The Trade Center acts as a direct referral source for training

and placement of women. In the two years that the Women's Trade Center has been in operation over 400 women have been counseled.

* * * *

Because of the extraordinary interest in the issues presented in this case, a large number of amicus briefs have been filed. The following statement of principles will apprise the Court of the mutual support of many amici for the following basic positions in defense of the affirmative action program in controversy in the present case:

1. This country cannot attain true equality of opportunity without affirmative action.

2. Title VII and the antidiscrimination principle must be understood in the context of our nation's history of discrimination against non-white people and women and its resulting national patterns

of underrepresentation and inequality in the workforce.

3. As stated by the EEOC, the lead agency for equal employment opportunity enforcement, in its Affirmative Action Guidelines, a major purpose of Title VII is to "improve the social and economic conditions of minorities and women" through "voluntary action."

4. Title VII and Executive Order 11246, as amended, should not focus solely on proven violations of the law; on the contrary, national antidiscrimination policy addresses current unequal conditions and provides mechanisms for their elimination.

5. We know that the remedies for discrimination against minorities and discrimination against women are inextricably linked.

6. Voluntary action on the part of employers and unions is instrumental in redressing the pervasive patterns of discrimination addressed by Title VII and Executive Order 11246. But this objective cannot be achieved if employers and unions must first expose themselves to charges that they are violating the very laws they are seeking to implement.

7. Long experience shows that in many instances "employment tools which recognize the race, sex or national origin of applicants and employees" (see EEOC Affirmative Action Guidelines) such as those at issue in this case are presently the only effective means by which true equal opportunity can be achieved.

8. Our endorsement of voluntary affirmative action in no way diminishes our support for judicially mandated or administratively required affirmative measures which provide the necessary incentive for voluntary action.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADVOCATES FOR WOMEN, et al., Plaintiffs, v. F. RAY MARSHALL, et al., Defendants.	Civil Action Number 76-0862 (Judge Corcoran)

AFFIDAVIT OF JOHN M. HENEGHAN

District of Columbia) ss

1. My name is John M. Heneghan. I am the Director of the Office of Civil Rights, Maritime Administration, U.S. Department of Commerce. I have held this position since August of 1968. This office is responsible for the enforcement of Executive Order 11246, as amended by Executive Order 11375 (The Executive Order). We have jurisdiction over the shipbuilding

and ship repair industry as well as the shipping industry in the coastal states of the United States.

2. Before coming to this agency I was Deputy Regional Director of the Equal Employment Opportunity Commission in the Atlanta Region. Prior to that I was responsible for the contract compliance program under Executive Order 10925 (predecessor to current Executive Orders in the field of contract compliance) for the Navy Department in the Southeast Region. Before coming to government I had twelve years of general experience in the field of industrial relations. My experience in dealing with the shipbuilding industry dates back to 1964 when I first conducted a compliance review of the Ingalls Shipbuilding facility in Pascagoula, Mississippi.

3. The shipbuilding industry in the post World War II period had been a predominantly male industry, particularly in the blue-collar trades. The shipbuilding industry is akin to the construction industry inasmuch as the workforce is divided along craft lines.

* * *

5. My early dealings with discrimination in the industry were limited to racial and ethnic discrimination. Under the Executive Order we did not have the authority to deal with sex discrimination until 1968. Between the period 1968 thru December 1971 the rules and regulations of the Department of Labor under which we operated did not explicitly state that goals and timetables should be obtained by sex. In this early period prior to December 1971 we had very few complaints from women with

respect to blue-collar employment opportunities in the industry.

6. In this early period management resisted the idea of bringing women into the shipbuilding industry. There was concern about the expense of building or renovating toilet and locker facilities. Concern was also expressed about the heavy physical nature of the work and the physique of women. There also was concern about the uncertain numbers of women that would apply if facilities were available.

7. Nationally, there were 221 women employed in the blue-collar occupations in the industry in 1971. This represented .3% of the blue-collar workers in the industry. In early 1972 we began requiring the contractors under our jurisdiction to have goals and timetables for women in all blue-collar occupations. This requirement

was based on amended Office of Federal Contract Compliance regulations that applied the same standards for goals and timetables to women as was required for racial/ethnic groups. By early 1976 there were 4,223 women in the blue-collar occupations accounting for 4.7% of all these positions. The earlier concerns of industry proved to be ungrounded once women were actively recruited. An interesting side effect of introducing women in the workforce was a decrease in turnover. This has been a perennial problem in the industry and women have been more stable workers in shipyard occupations.

8. When we first approached contracts for goals and timetables in shipyard jobs we had no guidelines as to setting numbers. As a rough rule-of-thumb we chose a figure of 50% of the participation rate of women in the labor market as a goal for beginning

jobs. Thus in a labor market that had 40% female participation we suggested a goal of 20% for entry level jobs. No goals were set for advanced blue-collar jobs. Once a certain number of women had been employed, we established goals for their promotion into the advanced blue-collar jobs.

9. Initially there was concern on the part of management with respect to the novelty of women in these non-traditional jobs. We encouraged management to bring in a large number of women at a time to diffuse the novelty and decrease the tensions that would apply to isolated women. Hiring women in large numbers did prove to be a successful technique.

10. One of the larger, more dramatic increases in female participation took place in the Ingalls Pascagoula yard where the number of blue-collar women increased from

89 in 1971 to 2,128 in 1977 and yet prior to 1971 there were no complaints of sex discrimination nor female applicants for the shipyard jobs. One phenomenon that we have noted is that as more women are employed a snow-ball effect is observed in the applicant flow of women. In our earliest efforts we only expected an applicant flow of less than half of the normal female participation rate in a labor market. At the present time the applicant flow into the Ingalls Pascagoula yard is running at the normal participation rate of women in that labor market.

* * *

Further the affiant saith not

s/John M. Heneghan
John M. Heneghan

Sworn to and subscribed
before me this 4th
day of February, 1977.

s/Anne E. Manning
Notary Public

My commission expires:

April 14, 1979